Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules	)	CC Docket No. 96-149

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 2003 **Released: November 4, 2003**

By the Commission: Commissioner Martin issuing a separate statement; Chairman Powell concurring in part, dissenting in part and issuing a separate statement; and Commissioner Abernathy dissenting and issuing a separate statement.

I. INTRODUCTION

1. The Verizon companies filed a petition for forbearance,[1] under section 10 of the Communications Act of 1934, as amended (the Act),[2] requesting that the Commission forbear from applying sections 53.203(a)(2)-(3) of the Commission's rules,[3] which prohibit a Bell operating company's (BOC) section 272 affiliate from sharing operating, installation, and maintenance (OI&M) functions with the BOC or another BOC affiliate. In this Order, we

[1] Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Section 53.203(a)(2) of the Commission's Rules, CC Docket No. 96-149 (filed Aug. 5, 2002) (Verizon Petition). The Verizon companies are the local and long distance telephone companies affiliated with Verizon Communications Inc. *See* Verizon Petition, Attach. A. Comments were filed on September 9, 2002 by AT&T Corp. (AT&T), BellSouth Corporation (BellSouth), SBC Communications Inc. (SBC), Sprint Corporation (Sprint), United States Telecom Association (USTA), and WorldCom Inc. (WorldCom/MCI). Reply comments were filed on September 24, 2002 by Qwest Services Corp. (Qwest), Sprint, USTA, and Verizon. *See Wireline Competition Bureau Seeks Comment on Verizon's Petition for Forbearance from the Prohibition of Sharing Operating, Installation and Maintenance Functions*, CC Docket No. 96-149, Public Notice, 17 FCC Rcd 15813 (2002). On July 11, 2003, the Wireline Competition Bureau (formerly Common Carrier Bureau) (Bureau) released an order extending by 90 days, to November 3, 2003, the date by which the Verizon Petition shall be deemed granted in the absence of a Commission decision that the petition fails to meet the standards for forbearance under section 10(a) of the Act. *See Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149, Order, 18 FCC Rcd 14457 (WCB 2003).

[2] 47 U.S.C. § 160.

[3] 47 C.F.R. § 53.203(a)(2)-(3). Sections 53.203(a)(2) and (a)(3) of the Commission's rules together codify the restriction on sharing of OI&M functions. Although the caption of the Verizon Petition cites only section 53.203(a)(2) of the Commission's rules, Verizon also seeks relief from subsection (a)(3). *See* Verizon Reply at 22 n.10.

conclude that the Commission may not forbear, under section 10, from section 272 and the OI&M rules until three years after the grant of section 271 authority in a state on a state-by-state basis. Accordingly, we deny Verizon's petition for forbearance from applying the OI&M sharing prohibition under section 272(b)(1) of the Act and sections 53.203(a)(2)-(3) of the Commission's rules to Verizon's OI&M services.

II. BACKGROUND

A. Sections 271 and 272

2. Sections 271 and 272 establish a comprehensive framework governing BOC provision of "interLATA service."[4] Pursuant to section 271, neither a BOC nor a BOC affiliate may provide in-region, interLATA service prior to receiving section 271(d) authorization from the Commission.[5] In order to grant section 271(d) authorization, the Commission must make a series of findings on which to base its determination to approve or deny the section 271 application. Among these findings, section 271(d)(3)(B) requires the Commission to find that "the requested authorization will be carried out in accordance with the requirements of section 272."[6] Section 272, in turn, requires BOCs, once authorized to provide in-region, interLATA services in a state under section 271, to provide those services through a separate affiliate until the section 272 separate affiliate requirement sunsets for that particular state.[7] In addition, section 272 imposes structural and transactional requirements on section 272 separate affiliates, including the requirement to "operate independently" from the BOC.[8] The Commission previously has interpreted this requirement to include the obligation to maintain separate OI&M services.

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[4] The term "interLATA service" is defined in the Act as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[5] 47 U.S.C. § 271(b)(1). Sections 271(f) and 271(b)(3) provide exceptions to the general section 271 prohibition against the provision of in-region, interLATA services without section 271(d) authority. 47 U.S.C. § 271(f), (b)(3). Neither exception is relevant to the Verizon Petition because Verizon seeks forbearance for OI&M services related to in-region, interLATA services authorized under section 271(d)(3).

[6] 47 U.S.C. § 271(d)(3)(B).

[7] *See* 47 U.S.C. § 272(a)(2)(B), (f)(1) (requiring separate affiliate for three years "unless the Commission extends such 3-year period by rule or order"); *see also Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Memorandum Opinion and Order, 17 FCC Rcd 26869, 26876, para. 13 (2002) (*Section 272 Sunset Order*) ("We find that section 272(f)(1) should be interpreted as providing for a state-by-state sunset of the section 272 separate affiliate and related requirements."). The section 272 provisions (other than section 272(e)) expired for Verizon's operations in New York on December 23, 2002. *See Section 272 Sunsets for Verizon in New York State by Operation of Law on December 23, 2002 Pursuant to Section 272(f)(1)*, WC Docket No. 02-112, Public Notice, 17 FCC Rcd 26864 (2002).

[8] 47 U.S.C. § 272(b)(1).

B. Operating, Installation, and Maintenance Rules

3. Section 272(b)(1) directs that the separate affiliate required pursuant to section 272(a) "shall operate independently from the [BOC]."[9] In the *Non-Accounting Safeguards Order*, the Commission concluded that the "operate independently" language of section 272(b)(1) imposes requirements on section 272 separate affiliates beyond those detailed in section 272(b)(2)-(5).[10] As a result, the Commission adopted rules to implement the "operate independently" requirement that prohibit a BOC and its section 272 affiliate from (1) jointly owning switching and transmission facilities or the land and buildings on which such facilities are located;[11] and (2) providing OI&M services associated with each other's facilities.[12] Specifically with regard to sharing OI&M functions,[13] the Commission's rules prohibit a section 272 affiliate from performing OI&M functions associated with the BOC's facilities. Likewise, they bar a BOC or any BOC affiliate, other than the section 272 affiliate itself, from performing OI&M functions associated with the facilities that its section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated.[14]

C. Section 10

4. The Act requires the Commission to forbear from applying any regulation or any provision of the Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that the three conditions set forth in section 10 are satisfied. In particular, section 10 provides that

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[9] 47 U.S.C. § 272(b)(1).

[10] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21981, para. 156 (1996) (*Non-Accounting Safeguards Order*), Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom. Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, 14 FCC Rcd 16299 (1999). Sections 272(b)(2)-(5) provide that the section 272 separate affiliate "(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the [BOC] of which it is an affiliate; (3) shall have separate officers, directors, and employees from the [BOC] of which it is an affiliate; (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]; and (5) shall conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection." 47 U.S.C. § 272(b)(2)-(5).

[11] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-84, paras. 158-62; 47 C.F.R. § 53.203(a)(1).

[12] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-82, 21984-86, paras. 158, 163-66; 47 C.F.R. § 53.203(a)(2)-(3). The Commission clarified that "'sharing of services' means the provision of services by the BOC to its section 272 affiliate, or vice versa." *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990-91, para. 178.

[13] Operating, installation, and maintenance functions generally include all activity related to installing, operating, and maintaining (*e.g.*, making repairs to) switching and transmission facilities subject to section 53.203(a)(1).

[14] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-82, 21984-86, paras. 158, 163-66; 47 C.F.R. § 53.203(a)(2)-(3).

> the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that --
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> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
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> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
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> (3) forbearance from applying such provision or regulation is consistent with the public interest.[15]

With regard to the public interest determination required by section 10(a)(3), section 10(b) states that, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."[16] Section 10(d) specifies that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under [section 10(a)] until it determines that those requirements have been fully implemented."[17]

III. DISCUSSION

5. As a threshold matter, we must consider whether section 10(d) permits the forbearance sought by Verizon in this proceeding. Under section 10(d), the Commission may not forbear from applying the requirements of section 271 unless it determines that those requirements are "fully implemented." Thus, the Commission cannot grant relief to Verizon if (1) parts of section 272 are incorporated by reference as requirements of section 271; and (2) the requirement has not yet been fully implemented. Opponents of Verizon's petition argue that section 10(d) incorporates by reference certain requirements of section 272 and prohibits the Commission from forbearing from these requirements, including the OI&M sharing prohibition, until section 271 is deemed to be "fully implemented."[18] Verizon, on the other hand, responds that the statutory language of section 10(d) unambiguously shows that Congress did not intend to

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[15] 47 U.S.C. § 160(a).

[16] 47 U.S.C. § 160(b).

[17] 47 U.S.C. § 160(d). Section 251(f), not relevant here, provides for exemptions, suspensions, and modifications for rural telephone companies and rural carriers. 47 U.S.C. § 251(f).

[18] *See*, *e.g.*, WorldCom/MCI Comments at 1-2; Letter from David L. Lawson, Counsel for AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-149 at 2, 4-5 (filed July 9, 2003) (AT&T July 9 *Ex Parte* Letter); Letter from A. Renee Callahan, Counsel for WorldCom/MCI, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-149, Attach. at 4-5 (filed Oct. 17, 2003).

include the section 272 requirements because it only lists sections 251(c) and 271.[19] Accordingly, our consideration of the Verizon Petition requires that we look to the scope our forbearance authority and determine whether we are prohibited by the language of section 10(d) from forbearing from section 272 for services authorized under section 271(d). We find that section 10(d) prohibits us from granting the instant petition. An analysis of the statutory language shows that aspects of section 272 are incorporated by reference into section 271, and are, therefore, included within the section 10(d) limitation.

6. Section 271(d) requires a BOC to seek authority from the Commission before it may provide in-region, interLATA services,[20] and the Commission to make a series of findings on which to base its determination approving or denying a section 271 application.[21] Among these findings, section 271(d)(3)(B) requires the Commission to find that "the requested authorization will be carried out in accordance with the requirements of section 272."[22] We find that the language of section 271(d)(3)(B) incorporates section 272 requirements that are directly related to the authority granted through approval of a section 271 application. These requirements include the obligation to provide in-region, interLATA services through a section 272 separate affiliate for at least a three-year period.[23] Section 10(d), in turn, limits the Commission's authority to forbear from the requirements of section 271. Specifically, section 10(d) states that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented."[24] As such, we conclude, as the Bureau did in a previous decision,[25] that section 10(d) prohibits forbearance from the

[19] *See, e.g.,* Letter from Ann D. Berkowitz, Project Manager – Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-149, Attach. at 2 (filed June 23, 2003) (Verizon June 23 *Ex Parte* Letter).

[20] 47 U.S.C. § 271(d)(1). *But see* 47 U.S.C. § 271(b)(3), (f) (providing certain limited exceptions to the general prohibition on the provision of in-region, interLATA services prior to section 271(d) authorization).

[21] 47 U.S.C. § 271(d)(3).

[22] 47 U.S.C. § 271(d)(3)(B); *see Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, WC Docket No. 02-134*, Memorandum Opinion and Order,* 17 FCC Rcd 26303, 26516-17, para. 384 (2002) (*Qwest 9-State Order*) ("Consistent with our approach to other BOC applications under section 271, our judgment about Qwest's compliance with section 272 is a predictive one, as required by section 271(d)(3)(B) of the Act. Specifically, our task is to determine whether Qwest's section 272 affiliate, QLDC, will be complying with this requirement on the date of authorization, and thereafter.") (citations omitted).

[23] This analysis is consistent with the Commission's previous statements that it has authority to enforce section 272 under section 271(d)(6). *See, e.g., Qwest 9-State Order*, 17 FCC Rcd at 26518, para. 386; *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22070, para. 341.

[24] 47 U.S.C. § 160(d). Section 251(f), not relevant here, provides for exemptions, suspensions, and modifications for rural telephone companies and rural carriers. 47 U.S.C. § 251(f).

[25] *See Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627, 2641, para. 23 (Com. Car. Bur. 1998) (*E911 Forbearance Order*).

requirements of section 271, and through incorporation, those requirements of section 272 related to the provision of in-region, interLATA services authorized under section 271(d). This incorporation includes the requirement to maintain the affiliate structure for at least three years, until "those requirements have been fully implemented." Therefore, we find that, with respect to services that require authorization under section 271(d), section 272 cannot be deemed to have been "fully implemented" until this three-year period has passed. Our analysis here applies only to whether section 271 is "fully implemented" with respect to the cross-referenced requirements of section 272, and does not address whether any other part of section 271, such as the section 271(c) competitive checklist, is "fully implemented." We note that the Commission has, in the past, forborne from section 272 for services that do not require authorization under section 271(d).[26] Because these services are not covered by the section 271(d) authorization process, the section 272 requirements that apply to them are not incorporated into section 271, and therefore, are not included in the section 10(d) limitation.

7. Based on this analysis, we conclude that section 272 is "fully implemented" on a state-by-state basis three years after the grant of section 271 authority in a state. We believe that this is the most reasonable approach because it gives meaning consistent with the goals of the Act to the term "fully implemented," while paralleling the state-by-state section 271 application process and the state-by-state section 272 sunset process.[27] In adopting this approach, we reject Verizon's argument that linking the "fully implemented" determination to the section 272 sunset provision would "render the 'full implementation' exception to section 10(d) a nullity with respect to [section 272]."[28] Indeed, the approach we adopt here gives meaning to the "fully implemented" language but leaves intact the Commission's authority to forbear from section 272 requirements in appropriate circumstances. For example, the Commission may forbear from section 272 requirements that apply to services that do not require authorization under section 271(d), or that remain in place after the three-year period (such as the section 272(e) requirements that are not subject to the section 272(f)(1) sunset, or in the case where the Commission has extended the sunset date as provided by section 272(f)(1)). Therefore, this interpretation does not render the "fully implemented" language a nullity as Verizon contends.

8. Although Verizon does not concede that section 272 is included within the section 10(d) limitation, Verizon also argues that the OI&M restriction cannot be a "requirement" of section 272, as that term is used in section 10(d), because it was a discretionary judgment by the Commission to adopt it in the first place.[29] In the *Non-Accounting Safeguards Order*, the

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[26] *See, e.g., Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance,* CC Docket No. 97-172, *Petition of U S WEST Communications, Inc., for Forbearance,* CC Docket No. 97-172, *The Use of N11 Codes and Other Abbreviated Dialing Arrangements,* CC Docket No. 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252 (1999); *E911 Forbearance Order; see also* AT&T July 9 *Ex Parte* Letter at 5-6.

[27] *See Section 272 Sunset Order*, 17 FCC Rcd at 26875, para. 11.

[28] *See* Letter from Dee May, Assistant Vice President – Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-149, 01-338, 96-98, 98-147, WC Docket No. 02-200 at 2 (filed Oct. 14, 2003).

[29] *See* Verizon June 23 *Ex Parte* Letter at 9.

Commission concluded that the "operate independently" language of section 272(b)(1) imposes requirements on section 272 separate affiliates beyond those detailed in sections 272(b)(2)-(5).[30] The Commission's OI&M rules were adopted to give meaning to the "operate independently" requirement. Under section 10, Congress gave the Commission the power to forbear from enforcing "any regulation or any provision of this Act."[31] We reject Verizon's argument that section 10(d) should be read so narrowly as to address forbearance only from statutory provisions.[32] Although we find that we may not forbear from these rules under the current circumstances, section 10(d) does not preclude us from considering modifying or repealing these rules through a notice-and-comment rulemaking proceeding.

9. Accordingly, section 272 is not "fully implemented," as that term is used in section 10(d), in states in which less than three years have elapsed since Verizon was granted authority to provide interLATA services pursuant to section 271(d).[33] Therefore, we must deny Verizon's petition for forbearance from the OI&M sharing prohibition. Finally, because we deny Verizon's petition on the grounds that section 272 is not "fully implemented," we do not reach opponents' other arguments related to the merits of the substantive relief that Verizon seeks.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 10, 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 160, 272, 303(r), that Verizon's petition for forbearance with respect to its operating, installation, and maintenance functions IS DENIED.

11. IT IS HEREBY FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[30] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981, para. 156.

[31] 47 U.S.C. §160(a).

[32] *See* Verizon June 23 *Ex Parte* Letter at 9.

[33] We note that the section 272 requirements (other than section 272(e)), including the OI&M sharing prohibition, have already sunset in New York. *See* n.7, *supra*. Therefore, Verizon's request for forbearance, to the extent that it applies to New York, is moot.

STATEMENT OF CHAIRMAN MICHAEL K. POWELL CONCURRING IN PART, DISSENTING IN PART

Re: *Verizon Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149

I am troubled by the Commission's unwillingness to consider Verizon's request for forbearance from the ban on sharing operation, installation and maintenance functions ("OI&M"). In section 10 of the Act, Congress granted this Commission powerful and sweeping forbearance authority to address situations such as these. Nonetheless, my colleagues prefer addressing the continued viability of our OI&M rules in the context of a notice and comment rulemaking. I hope to conclude that rulemaking expeditiously.

DISSENTING STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, CC Docket No. 96-149 (adopted Nov. 3, 2003).

I respectfully dissent from the Commission's decision to reject Verizon's forbearance petition seeking elimination of the ban on sharing operation, installation, and maintenance ("OI&M") functions. In my view, the Commission may forbear from the OI&M rule without even implicating section 10(d) of the Act[34] — and thus without deciding whether section 271 is "fully implemented" — because the OI&M restriction is not a "requirement" of the statute. Rather, the Commission adopted this prophylactic ban notwithstanding that more limited degrees of separation could have faithfully implemented the statutory requirement that the Bell company and its long distance affiliate "operate independently." In any event, I disagree with the Commission's conclusion that section 271(d)(3)[35] has not been fully implemented even after the grant of section 271 authority throughout Verizon's service territory. Had the Commission reached the merits of the forbearance analysis under section 10(a), I would have been inclined to conclude that the prohibition on sharing OI&M functions is not necessary to ensure just and reasonable rates or practices, to protect consumers, or to promote the public interest.

First, I disagree that section 10(d) bars forbearance from the OI&M rule. While section 10(a) authorizes the Commission to forbear from "any regulation *or* any provision of this Act," 47 U.S.C. § 160(a) (emphasis added), the limitation in section 10(d) applies only to the "requirements of section 251(c) or 271" themselves. *Id.* § 160(d). To be sure, some Commission rules are "requirements" of the statutory provisions they implement. But I cannot agree with the Commission's apparent holding that *every* regulation promulgated under section 272 is *necessarily* a "requirement" of the statute. In fact, the statute typically permits a range of different policy outcomes, none of which is required. Indeed, this is why the *Chevron* doctrine governing judicial review has two steps: one for situations where the statute compels a particular result, and one for the far more common situations where it does not. Given that the Commission usually has a broad range of permissible policy choices under the Communications Act, it would be bizarre if whatever regulation the Commission promulgates is transformed into a "requirement" of the statute, even as other, mutually exclusive choices also could have become "requirements" of the very same provision.

There is little doubt that the OI&M restriction falls into the category of rules that are not "requirements" of the statute. When the Commission adopted the ban on sharing OI&M functions, it acknowledged that — unlike some of the other safeguards it was adopting — this rule was not compelled by the text of section 272. Rather, the Commission was concerned that lesser degrees of structural separation would require "excessive, costly and burdensome regulatory involvement in the operation, plans and day-to-day activities of the carrier . . . to audit and monitor the accounting plans necessary for [the sharing of OI&M functions] to take place."[36] The Commission thus made a *policy* judgment that the

[34] Section 10(d) provides that the Commission "may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."

[35] Section 271(d)(3)(B) requires the Commission to find, before granting authority to provide in-region interLATA services, that "the requested authorization will be carried out in accordance with the requirements of section 272."

[36] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21984 ¶ 163 (1996) (internal quotation marks and citation omitted).

OI&M rule would best effectuate the statutory requirement that the BOC and its long distance affiliate operate independently. If the Commission now finds, based on its experience with the OI&M rule, that the prohibition is *not* necessary to achieve its intended purposes, it has the flexibility to forbear from that regulation because other regulations are sufficient to ensure compliance with section 272(b)(1) of the Act.

Moreover, I find it anomalous, to say the least, that at the same time the Commission finds the OI&M rule to be a requirement of the statute, it is willing to adopt a companion NPRM that expresses a willingness to consider elimination of this very rule. If the majority is correct that the OI&M rule is a requirement of the Communications Act, then how can we simultaneously propose to do away with it in a rulemaking? To the extent that the majority believes that a rule adopted pursuant to a notice of proposed rulemaking may be changed only through a subsequent NPRM, the plain text of section 10 belies that argument. Congress, giving teeth to its general preference for competition over regulation, not only authorized elimination of a Commission regulation through the vehicle of forbearance, but went so far as to *mandate* forbearance from any regulation where the three-part set forth in section 10(a) is satisfied. 47 U.S.C. § 160(a).[37]

Second, even if the OI&M rule were required by section 272, I disagree with the majority's conclusion that the requirements of section 271 are not fully implemented in the states served by Verizon. The majority reasons that, because section 271(d)(3)(B) requires the Commission to find, before granting a section 271 application, that "the requested authorization will be carried out in accordance with the requirements of section 272," and because section 272 requires the BOC to provide in-region, interLATA services through a separate affiliate for at least three years, section 271 is not "fully implemented" until the sunset of the section 272 requirements. That argument has some superficial appeal, but I believe it is wrong for several reasons.

The Commission's approval of a section 271 application represents the culmination of an exhaustive and exacting regulatory process. Congress understandably forbade the Commission from short-circuiting that process; it sought to ensure that a BOC would be permitted to enter the long-distance business if and only if the statutory prerequisites have been satisfied (as is now the case throughout Verizon's service territory). One of those prerequisites, set forth in section 271(d)(3)(B), calls on the Commission to make a *predictive judgment*, based on evidence in the record, about a BOC's *future* compliance with section 272. Once that judgment has been made, however, and the BOC is authorized to provide in-region interLATA services, section 271 has been "fully implemented," since no further action by the Commission is required. Thereafter, the obligation to continue complying with section 272 and the Commission's implementing regulations is a requirement of section 272 itself, not of section 271(d)(3)(B). And if the Commission later forbears from one of the requirements imposed under section 272, that cannot retroactively undermine the Commission's full implementation of section 271.

The logic underlying the majority's approach implausibly suggests that section 271 may *never* be fully implemented, given that all of the section 271 requirements have continuing effect. For example, while the Commission must determine under section 271(d)(3)(A) that the competitive checklist has been

[37] I am also concerned that the Commission's decision to deny forbearance based on its apparent preference to address the OI&M rule in a rulemaking parallels the Commission's decision in 1999 rejecting a petition to forbear from dominant-carrier regulation based on its preference to address that issue under the framework established by the *Pricing Flexibility Order*. The D.C. Circuit made clear that the Commission may not deny forbearance on the ground that another mechanism may provide similar relief. *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) ("Congress has established section 10 as a viable and independent means of seeking forbearance. The Commission has no authority to sweep it away by mere reference to another, very different regulatory mechanism.").

"fully implemented,"[38] the BOC of course remains obligated to comply with the nondiscriminatory access obligations set out in the checklist following the grant of the section 271 application. Thus, if the ongoing effectiveness of a requirement were enough to prevent full implementation, section 10(d) would be impossible to satisfy. Moreover, even if section 271 could be fully implemented under the majority's approach, full implementation would be meaningless, since, by the time the section 10(d) bar is removed, the section 272 requirements (and the Commission's OI&M rule) will have sunset pursuant to section 272(f). We should not interpret section 10(d) to be a nullity. The better interpretation treats a grant of section 271 authority in a state — the main event in the section 271 process — as full implementation in that state, with section 271(d)(6) serving as an ongoing check against undoing what was demonstrated in the application process.

Notably, finding section 10(d) inapplicable by no means establishes that forbearance is warranted; it simply makes a BOC *eligible* for forbearance. Each of the factors set forth in section 10(a) also must be satisfied. The fact that full implementation only gets a BOC through the starting gate, rather than across the finish line, further supports the argument that section 10(d) is satisfied upon the grant of section 271 authority in a given state.

Finally, because I believe that section 10(d) poses no bar to forbearance, I would have proceeded to apply the three-part test set forth in section 10(a), and I likely would have found it satisfied. I am reluctant to provide a more definitive view, because the Commission appears willing to consider elimination of the OI&M rule in a new rulemaking proceeding, in which I must keep an open mind. My tentative position is that the substantial costs imposed by the OI&M rule — including the need for duplicative resources — outweigh its benefits, especially given that the remaining safeguards appear adequate to prevent discrimination or other misconduct. While I am disappointed by the Commission's refusal to grant forbearance, and I consider that refusal legally suspect, I welcome the opportunity to revisit the merits in the upcoming rulemaking.

[38] Congress's use of the phrase "fully implemented" to describe satisfaction of the 14-point competitive checklist, 47 U.S.C. § 271(d)(3)(A)(i), strongly suggests that the identical language in section 10(d) of the Act was intended to preclude forbearance only until the Commission has found section 271 as a whole to be satisfied (*i.e.*, until the Commission has granted the application) for the state in question. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (observing that identical words used in different parts of the same statute are intended to have the same meaning).

SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN

Re: *Section 272(b)(1) "Operate Independently" Requirement for Section 272 Affiliates;* **WC Docket No. 03-228**

Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules; **CC Docket No. 96-149**

I am pleased that the Commission is reviewing its requirements regarding its OI &M rules governing a Bell Operating Company's (BOC) section 272 affiliate. Although I had reservations about the statutory authority to allow the Commission to forbear from the statute, I support the notice asking whether these rules are required. I concur in the notice, however, because I am disappointed by my colleagues failure to support a tentative conclusion to eliminate these rules. In my view, sufficient evidence exists to tentatively conclude that the operating, installation, and maintenance sharing prohibition is an overbroad means of preventing improper cost allocation or discrimination as required by the statute.

Finally, I am confused as to why some of my colleagues advocate complete elimination of any OI&M requirement as in the public interest in one item, but are unwilling to support the same "tentative conclusion" in the other item. If they were willing to decide the issue finally today, why are they unwilling to make the same conclusion tentatively.